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November 20, 1995

VIA HAND DELIVERY

NOV 20 1995

William Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

Re: Filing of Comments in IB Docket No. 95-168 and PP Docket No. 93-253

Dear Mr. Caton:

American Satellite Network, Inc., pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419 hereby submits an original and five copies of its Comments for filing in the above-referenced proceeding. A list of other parties to whom the comments were also delivered is attached to the Comments.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

*Leonard Schneidman*

Leonard Schneidman  
(by Steven A. Bercu)

Enclosures

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NOV 20 1995

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Revision of Rules and Policies for the  
Direct Broadcast Satellite Service

)

)

) IB Docket No. 95-168

) PP Docket No. 93-253

To: The Commission

COMMENTS OF AMERICAN SATELLITE NETWORK, INC.

American Satellite Network, Inc.  
153 E. 53rd Street  
New York, NY 10022  
(212) 355-3440

November 20, 1995

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## SUMMARY

American Satellite Network, Inc. ("ASN"), a diversified media and communications company, owns a majority interest in PrimeTime 24, a satellite programmer and distributor. PrimeTime 24 provides broadcast network television programming to persons -- primarily in rural areas -- unable to receive adequate signals from local network affiliates. PrimeTime 24's sole competitor in this business is an entity wholly owned and directly controlled by Tele-Communications, Inc.

ASN believes that any allocation of DBS orbital locations, particularly full-CONUS positions, to a cable-affiliated DBS operator poses acute risks. These risks include undue media concentration and foreclosure of programmers and distributors from participating in DBS services. Ultimately, the result to the viewing public will be increased costs for programming services and a decline in programming diversity. Moreover, the harm will disproportionately befall persons in underserved areas, who already tend to pay too much for too little, when it comes to mass media.

The Commission should take strong measures to prevent unchecked domination of DBS orbital locations either by major existing cable operators or by other DBS licensees in the event that they acquire significant cable properties in the future. Historically, nationwide cable system operators used the threat of refused carriage in order to force small, independent programmers to surrender ownership positions in their networks. Thereafter, it has been extremely difficult for unaffiliated programmers to obtain the financing or achieve the access necessary for them to introduce programming in the cable environment. Concern that a few large cable operators were gaining control over cable carriage led Congress and

the Commission to impose restraints on cable operators, including limits on use of their cable systems to carry their own programming.

A few industry giants were able to gain control over thousands of cable systems dispersed throughout the 50 states. Having accomplished this, they now turn their sights to the handful of full-CONUS orbital locations for DBS services. The Commission should act decisively to put in place a multi-prong program to keep the skies open to the voices of independent programmers and distributors, who have no market power over cable or any other multichannel mode of video distribution, and to preserve the ability of consumers to choose between sources of DBS programming. It would be unfortunate if a handful of Cable-DBS Entities were able to assume exclusive or dominant control over DBS services in the United States.

To preclude these events, the Commission should impose on a DBS operator a percentage limitation on the amount of programming in which it holds an attributable interest which it can use on its DBS system. Additionally, the Commission should impart fair access obligations to DBS operators, particularly those affiliated with other MVPDs, so that they do not use their market advantages to crush potential entrants or competitors with coercive terms or conditions to DBS access. Finally, the Commission should strongly consider setting aside a portion of DBS spectrum for independents as a means to assure long-term, equitable access to DBS systems by independent programmers and thereby to secure diversity in DBS programming.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Rules and Policies for the	)	IB Docket No. 95-168
Direct Broadcast Satellite Service	)	PP Docket No. 93-253

To: The Commission

COMMENTS OF AMERICAN SATELLITE NETWORK, INC.

American Satellite Network, Inc. ("ASN") hereby submits the following Comments in response to the Commission's October 27, 1995 Notice of Proposed Rulemaking<sup>1</sup> (the "NPRM") seeking comments on the revision of its rules and policies for direct broadcast satellite ("DBS") services.

INTRODUCTION

The Commission has requested comments on its proposed method for reassigning 51 DBS channels that it has reclaimed for the public from Advanced Communications Corporation ("ACC"),<sup>2</sup> as well as comments on its new proposed DBS service rules. Those

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<sup>1</sup>In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service Notice of Proposed Rulemaking, FCC 95-443, Para. 57 (adopted October 27, 1995)("NPRM").

<sup>2</sup>Advanced Communications Corp., FCC 95-428, adopted October 16, 1995 ("Advanced Order").

new rules are intended to: (1) impose performance criteria ensuring that DBS resources are utilized in a timely manner; (2) guard against potential anticompetitive conduct by DBS providers; and (3) ensure timely DBS service to Alaska and Hawaii.

ASN conducts a variety of media- and communications-related businesses, many of which relate to satellite communications. For example, PrimeTime 24, a program packager of which ASN is the primary owner, provides network television programming to white areas, i.e., those households, primarily in rural areas, unable to receive adequate over-the-air broadcast signals from local network television affiliates. While PrimeTime 24 has obtained DBS distribution from DirecTV, it welcomes, together with ASN, the entry of additional DBS distributors in the U.S. marketplace.

ASN believes that, by allocating the final available full-CONUS DBS orbital location, the Commission will shape the face of the DBS industry for years to come. Consequently, ASN recommends that the Commission's proposed rules for DBS services be revised to ensure fair access of "independent programmers" such as ASN to all DBS systems and, in particular, the 51 channels and two orbital slots it has reclaimed from ACC.

**I. ASN Recommends that the Commission Adopt "Fair Access" Rules to Ensure Access for Independent Programmers for Carriage on DBS Systems.**

ASN agrees with the view described in the NPRM<sup>3</sup> that a cable-owned or -affiliated DBS operator has the opportunity and incentive to gain competitive advantage over other DBS operators and program services through vertical foreclosure strategies. A DBS operator that, through ownership of cable systems and of a large portion of the programming carried on cable systems, also enjoys meaningful control over cable distribution and programming

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<sup>3</sup>NPRM, Para. 57.

could easily sap the vitality of the emerging DBS television services market. Major cable system operators own so much of existing programming that independent programmers have largely been denied access to cable distribution. It is clear that unless the Commission acts, these cable operators will attempt to, and probably succeed in maintaining a grip on ownership and control of programming sources in the DBS arena.

In particular, such a cable-owned or -affiliated DBS operator or an entity that may become cable-owned or -affiliated in the future (a "Cable-DBS Entity") could deter satellite programmers with no attributable ownership in cable systems ("independent programmers") from distributing their programming through other DBS operators by threatening to discriminate against the independent programmers in providing customer service, billing, pay-per-view, authorization/deauthorization, promotional and marketing, or other services on which they depend, or even by withholding such services altogether for the distribution of the independent programmer's program services on cable systems controlled by the Cable-DBS Entity or its affiliates. Such actions by the Cable-DBS Entity would severely weaken distributors of satellite video programming, jeopardizing the public's access to different (non-Cable-DBS-Entity-owned) programming. Thus, an independent programmer such as PrimeTime 24 could be denied access to the public through an anticompetitive attack on independent programmers or distributors by a Cable-DBS Entity. ASN believes that, in DBS systems, Cable-DBS Entities will be particularly inclined to discriminate against providers of broadcast network programming, because of the inherent conflict of interest between the cable industry and the broadcast television industry with which it competes.



A Cable-DBS Entity could engage in a variety of predatory practices calculated to drive non-Cable programmers or distributors out of business or to make their entry into DBS programming so financially risky that few would be able to attract financing and ultimately enter this market. For example, from ASN's perspective, if Primestar and/or Tempo DBS (referred to herein, together with Tele-Communications, Inc. and its affiliates and subsidiaries, collectively as "TCI"), or any other entity with significant ownership of cable systems (such as Time-Warner or Comcast), gained exclusive use of the full-CONUS orbital location at 110° West recovered from ACC (the "110° Location"), it would have every incentive to allow an entity that it controls, such as one of PrimeTime 24's direct competitors, to become the monopoly provider of network television satellite retransmission services to persons who reside in unserved households ("white areas"). Moreover, even if the successful bidder for the 110° Location did not, at that time, have cable interests, it could thereafter acquire such interests, in which case it would have the same anticompetitive incentives as described hereafter. TCI could easily accomplish this result through: (i) predatory pricing of products, (ii) forcing PrimeTime 24's principal distributors, such as Showtime and HBO, to drop PrimeTime 24's programming in favor of that of its controlled satellite carrier entity or (iii) threatening to curtail marketing and promotion of programming owned by these distributors. Diminution or elimination of a competing television programming service to individuals who reside in unserved households -- primarily, in rural areas -- would very likely result in both higher prices and a reduced level of service<sup>4</sup> to such individuals, whose programming choices are, by definition, already severely limited.

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<sup>4</sup>See 47 U.S.C. §309(j)(3)(A-D).

A Cable-DBS Entity could use its clout with programmers to achieve several goals simultaneously: dry up the supply of quality programming available to DBS operators; erode the independent's profit margins; use its control over DBS distribution to consolidate its portfolio of programming assets; and freeze independent programmers out of both cable and DBS distribution by granting preferential treatment to the large share of programming services in which major cable system operators hold an ownership interest. The net result would be a loss of diversity in programming available to the public, with the shroud of silence falling disproportionately over the voices of independent programmers.

- A. *ASN Recommends that DBS Operators Be Allowed To Use only a Limited Percentage of Their Satellite Capacity for Program Services in Which They Have an Attributable Ownership Interest.*

PrimeTime 24, in which ASN holds a majority interest, operates in a narrow niche of the satellite television market. Yet for its customers, who would not otherwise be able to view broadcast network television programming, PrimeTime 24 fills an important need. PrimeTime 24's sole competitor in uplinking or wholesaling network television retransmissions is majority-owned and controlled by TCI. Were TCI to gain exclusive rights to operate in the 28 channels available at the 110° Location, its controlled satellite carrier entity would have an overwhelming advantage through its access, via TCI, to a full-CONUS DBS service, a service that appears to represent the future of the satellite programming industry. The losers in the transaction would be the public, particularly those viewers in white areas, who would find themselves depending for their access to broadcast network programming on a monopoly provider, TCI, with mixed allegiance to the satellite and cable markets, with little incentive to modulate the rates it charges to white-area subscribers and

with the built-in antipathy toward broadcast network programming inherent to the cable industry.

ASN recommends the Commission impose on DBS operators the same 40% channel capacity limit it has adopted for cable operators.<sup>5</sup> By limiting the amount of satellite capacity a DBS operator may use for program services in which it has an attributable ownership interest, the Commission will preserve a healthy mix of DBS viewing options and maintain competitive pressure on DBS subscription fees. Indeed, ASN notes that existing FCC cable carriage rules<sup>6</sup> have helped maintain fair and equal access for independent cable programmers.

*C. ASN Recommends that DBS Operators, Particularly Those Affiliated with Other MVPDs, Be Precluded from Coercing Unaffiliated Programmers into Discriminatory Terms or Carriage Conditions or Denying Unaffiliated Programmers Access to Their DBS Systems.*

ASN perceives a substantial risk that a Cable-DBS Entity in the future would exploit its position as a DBS operator in order to steer both affiliated and non-affiliated cable systems toward programming it owns and services it operates. Focusing on TCI in particular, ASN is concerned that TCI's planned "Headend in the Sky" ("HITS") service could substantially harm or even destroy independent programming wholesalers such as PrimeTime 24.

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<sup>5</sup>47 C.F.R. §76.504. The Commission cited many of the same concerns ASN has detailed above in its adoption of a 40% channel capacity limit for cable operators. See e.g., Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, ¶¶ 41-55 (1993).

<sup>6</sup>47 C.F.R. § 76.504.

PrimeTime 24 provides programming services to numerous cable system operators. TCI as a DBS operator would be highly motivated to deter and/or deny access to independent wholesale programming that competes with HITS programming.<sup>7</sup> Specifically, TCI or another Cable-DBS entity could do one or more of the following: (i) impose draconian conditions on independent programming wholesalers who seek access to its controlled DBS channels, in order to assure that such programmers will be unable to compete cost-effectively with a service such as HITS, (ii) use a service such as HITS to subsidize its controlled retail satellite programming and thereby curtail competition from independent retail satellite television programmers, (iii) deny such competitive programmers access altogether to its controlled DBS channels,<sup>8</sup> (iv) instruct its owned or affiliated cable systems to boycott independent wholesale satellite programming or (v) deter independent cable system operators from purchasing independent wholesale satellite programming on a competitive basis by using its influence over advertisers and its programming portfolio to exert pressure from a number of directions on independent cable systems. The cost of creating and promoting a programming service is very high, and independent programmers need long-term assurances that they will have fair access to DBS systems. Otherwise, creating independent programming services for the DBS market will entail unacceptable distribution risks.

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<sup>7</sup>See NPRM, Paras. 61-62.

<sup>8</sup>It is well-known that DBS operators and cable systems have limited channel capacity, which is expected to continue throughout the critical launch years of DBS services. Thus, it would be hard to prove with anything other than circumstantial evidence that a cable operator (such as TCI) is denying access for reasons other than "too few channels for too many programmers." Yet it would clearly be in its economic interest to do so.

ASN believes that the Commission should counteract such unwelcome vertical foreclosure practices by barring DBS operators from setting up a system whereby they could coerce independent programmers into discriminatory terms or conditions and from denying such programmers access to their DBS systems for both wholesale and retail transmission of programming. In short, ASN agrees with the Commission's conclusion that "it is in the public interest for it to ensure that DBS channels and orbital locations are not used by any entity in a manner that prohibits progress toward a competitive market for the delivery of video programming."<sup>9</sup>

**II. As a Preferred Alternative to "Fair Access" Rules, the Commission Should Set Aside Spectrum for "Independents."**

While fair access rules are in theory healthy for the DBS industry, ASN believes that their operation will entail significant administrative difficulties: they are subject to interpretation and bound to contain ambiguities or uncertainties that can only be clarified through lengthy and costly litigation. The resulting environment will be an unattractive and difficult one for any independent programmer that tries to operate or obtain financing within it. Therefore, ASN proposes that, as an alternative to "fair access" rules, the Commission set aside, at the 110° Location and at the 148° orbital location, and in any future DBS auction or license, a commercially meaningful amount of spectrum for "independents." For purposes of this set-aside, "independent" would mean a DBS programmer or distributor who has no market power over a nation-wide cable or any other nation-wide multichannel mode of video distribution. The independent programmer would have exclusive rights to the set-aside spectrum and would therefore be free to operate in a stable commercial setting with known

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<sup>9</sup>NPRM, Para. 62 (emphasis added).

risks that it controlled. Without this independent spectrum set-aside, media concentration would be sure to increase, resulting in fewer programming choices or distributor choices available to consumers.

*A. Independent Spectrum Set-Aside Will Advance Commission's Foremost Policy Goals.*

An independent spectrum set-aside will further the Commission's statutory mandate to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."<sup>10</sup> Cable-affiliated DBS operators will have numerous incentives to constrict the scope of DBS product, program and service offerings. First, such operators will resist carriage of products, programs or services that threaten to erode the market share of the operator's offerings. Further, as already pointed out, such operators may either refuse to carry or may carry only on commercially unfavorable terms programming either owned by rival cable system operators or distributed by packagers or wholesalers who refuse to "play ball" in accordance with the cable-affiliated DBS operator's view of the world.

Exclusive operation of a scarce full-CONUS orbital location by a cable-affiliated DBS operator would prevent or at the very least slow the arrival of new and innovative DBS offerings intended to meet the needs of the viewing public. Moreover, such delays could disproportionately disadvantage satellite subscribers in rural areas, who are already comparatively underserved. An independent set-aside will maximize the variety and innovativeness of DBS offerings and the speed with which they reach viewers.

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<sup>10</sup>47 U.S.C. § 309(j)(2)(B) and NPRM Para. 73.

*B. Independents Set-Aside Does not Trigger Commission's Concern that Acquisition of DBS Licenses by Undercapitalized Firms Could Delay DBS Service.*

Because the test for participation in DBS auctions as an "independent" will be lack of control over cable or other nation-wide means of multichannel video distribution, status as an independent has no relationship to a participant's capitalization or financial strength. Moreover, because an independent would only occupy 10% of the capacity of a DBS orbital location, the financial criteria that it must meet will be proportionately reduced. Having made this adjustment, the Commission could continue to adhere to financial criteria as conditions to auction participation and to allay the concerns expressed in the NPRM<sup>11</sup> that awards of licenses to undercapitalized firms would delay DBS service to the public.

Moreover, ASN believes that an independents spectrum set-aside will address part of Commissioner Barrett's concern that large DBS operators would foreclose small businesses and rural entities from DBS programming and distribution. Cable-affiliated DBS operators face smaller competitors at the levels of cable system operation, satellite programming, satellite retail distribution and satellite wholesale distribution. If such vertically integrated DBS operators also own programming interests, they will have the ability and incentive to squeeze out additional small competitors at the level of program origination.

*C. ASN Recommends that the Commission Set Aside 10% of DBS Channels in DBS Auctions for Independents.*

Current digitization and compression schemes allow transmission of six or more high-resolution video signals across each DBS channel. Consequently, using the 28 DBS channels available at the 110° Location, a current DBS operator can simultaneously transmit upwards

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<sup>11</sup>NPRM, Para. 104.

of 168 television program services with today's technology.<sup>12</sup> In coming years, compression technology will allow carriage of 8, 10 or even 12 signals per channel. An independents set-aside will include 10% of this capacity or, in the instance of the 110° Location, sufficient channel capacity to provide approximately 17 simultaneous television program services.

ASN believes that, contrary to the discussion in the NPRM,<sup>13</sup> this set-aside capacity is more than sufficient to create an economically viable range of programs and products at both the wholesale and retail levels. Indeed, PrimeTime 24 serves as a case in point: for over a decade, it has remained economically viable through providing a programming service consisting of initially a mere three and now seven simultaneous video program transmissions.

The Commission should exercise care not to hem the DBS industry into a predetermined economic model -- that of a single, monolithic, vertically integrated DBS operator and programmer at each full-CONUS orbital location that serves as the sole program source for DBS retail and wholesale customers (including HITS customers). Rather, ASN recommends that the Commission set aside 10% of DBS channel capacity in each orbital location so that competitors, particularly those unaffiliated with cable, have the flexibility to:

- cultivate independent sources of content, to preserve a sphere for non-dominant programming that competes with programming attributable to a DBS operator;

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<sup>12</sup>This number is derived by multiplying 28 DBS channels by six video program services per channel. The number will unquestionably increase as the state of data compression technologies and techniques continues to advance.

<sup>13</sup>Paras. 12-13.



- create programming mixes that might appeal to niche or underserved markets (including white areas);
- offer individualized menu choices of television programming at the wholesale level that distributors competitive with dominant DBS operators could assemble into appealing program packages at price points favorable to consumers; and
- pursue entrepreneurial partnerships, alliances and distribution models for the delivery of high-powered television and other data signals to consumers.

### III. CONCLUSION

DBS systems hold the promise to deliver enormous benefits, in terms of both program diversity and distribution alternatives, to consumers, particularly those who reside in rural and other underserved areas. Even as competitive DBS systems emerge on the horizon, the paired forces of communications industry consolidation and control of DBS systems by major cable operators threaten to undercut these benefits to the public. Major cable system owners have been able to suppress others in the cable industry; today it is virtually impossible for an independent programmer to achieve access to cable distribution. As a result, cable television lacks diversity, with most of the programming owned by the cable operators themselves. The Commission should make every attempt to assure that this unfortunate scenario does not repeat itself in the satellite area, where it appears that major cable operators now seek to extend their domination through control of the coveted full-CONUS orbital locations for DBS services. Cable-DBS Entities will have every incentive to freeze-out the programming of independents and to use their influence across the board -- from program origination, to back-room operations, to control of customer lists, to marketing and promotions, to cable distribution of DBS services -- to weaken unaffiliated programmers and distributors. Without

fair access to distribution, independent programmers will have enormous difficulty attracting the financing required to create DBS programming services. Independent voices and true distribution alternatives will become hollow shells, as would-be DBS participants pay the price of admission by falling in line behind powerful, consolidated and concentrated Cable-DBS Entities. The Commission must act to hold the influence of Cable-DBS Entities over DBS programming and distribution within reasonable bounds. To preserve the viability of independent DBS programmers, the Commission should adopt clear and long-term fair access rules or set-aside DBS channel capacity that would serve as a reliable platform on which independent DBS programmers could offer diverse programming alternatives to the public.

Respectfully submitted,

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Dated: November 20, 1995

Its Attorneys

### Certificate of Service

I, Steven A. Bercu, hereby certify that the foregoing "Comments of American Satellite Network, Inc." were delivered by hand on November 20, 1995 to the following:

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By   
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Certificate of Service

I, Steven A. Bercu, hereby certify that the foregoing "Comments of American Satellite Network, Inc." were delivered by first class mail on November 20, 1995.

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